

POLICY

INTRODUCTION

The Texas Natural Resource Conservation Commission (TNRCC) is responsible for regulating a broad array of activities that impact the quality of our natural resources and that can impact public health. While the TNRCC's activities are derived from state and federal statutory authority, most of these statutes must be developed into specific rules or regulations that inform the public, and especially the regulated community, of specific requirements. While most of the rules developed by the agency inform regulated entities of expectations or requirements, the rules also, in many cases, inform the public of how the agency will conduct its business. The TNRCC cannot deliver a high quality of service in carrying out its mission if it does not conduct rulemaking processes and deliver products from its rulemaking efforts that are of the highest quality. Because individual rulemaking projects can broadly affect the general public or the regulated community, rulemaking projects represent opportunities for the agency to achieve major successes or to suffer major failures. Successful rulemaking is a function of the process followed as well as the results achieved.

PURPOSE

This policy is designed to assure success in rulemaking by identifying the goals of successful rulemaking and identifying and explaining the roles and responsibilities of various organizational units and their representatives in rulemaking.

**GOALS FOR
TNRCC
RULEMAKING**

The keys to a successful rulemaking project can be found both in the process and in the substantive results achieved, and they closely mirror the guiding principles of the TNRCC.

- The rulemaking process must ensure meaningful public participation through solicitation and full consideration of the viewpoints of all interested internal and external parties.
- The rulemaking process must be predictable and free of surprises.

- The rulemaking process must comply with all statutory process requirements.
- The rulemaking process must be completed in a timely manner.
- Rules must be legally sound and defensible, and not exceed statutory authority.
- Rules must be based on good science, common sense, and current risk factors.
- Rules, to the maximum extent possible, should set performance standards while allowing flexibility in achieving the standard.
- Rules must be written in clear and understandable language.
- Rules must be written in a way that makes them practical to enforce.
- Redundant or outdated requirements should be eliminated whenever possible as an outcome of rulemaking projects.

EFFECTIVE

September 20, 1996

PROCEDURE: RULEMAKING AS A TEAM

**ROLES AND
RESPONSIBILITIES**

**RULEMAKING AS
A TEAM PROJECT**

Except in the most extraordinary circumstances, rulemaking projects will be conducted as team projects with team members from several parts of the TNRCC. This is for several reasons. First, there is generally a need for several types of expertise to be utilized in developing rules. Second, most rules cover subject matter that affects the operations of more than one division or office. Third and perhaps most importantly, rules and rulemaking projects are not the proprietary interest of individual divisions or offices of the TNRCC. Rules are products of the TNRCC as a whole, and they must be developed from the perspective of the agency as a whole. Generally, rulemaking teams will have members representing the program offices, Office of Policy and Regulatory Development (OPRD), and Legal Services. In each case, consideration also needs to be given to the need for representation of other offices including, but not limited to, field offices or enforcement, small business assistance, local government assistance, and pollution prevention.

A step-by-step outline of the rulemaking process is available from OPRD in a document entitled, “Rulemaking Steps.”

**RULES AND
POLICY REVIEW
COMMITTEE**

The Rules and Policy Review Committee (RPRC) reviews and approves all concepts before they are placed on the rule log and the rule process starts. The initiating office develops a concept paper, which is approved by the appropriate Deputy Director, and presents the concept to the RPRC.

The RPRC includes the OPRD Deputy Director, who chairs the committee, and representatives from the following areas:

- ▶ Office of Policy and Regulatory Development, which includes the Air Policy, Policy Research, Waste Policy, and Water Policy Divisions
- ▶ Office of Air Quality
- ▶ Office of Waste Management
- ▶ Office of Water Resource Management

- ▶ Office of Legal Services
- ▶ Office of Compliance and Enforcement, which includes the Field Operations, Compliance Support, and Enforcement Divisions
- ▶ Office of the Executive Director, which includes Office of Pollution Prevention and Recycling and Small Business Assistance Program
- ▶ Office of the Commissioners, which includes the Executive Assistants to the Commissioners, Office of Public Assistance, and Office of the Public Interest Counsel

A staff member from the Policy Research Division provides administrative support to the committee. The RPRC meets on the second and fourth Thursday of each month, unless otherwise determined.

RPRC can do one of four things:

1. Disapprove concept for rulemaking.
2. Defer rulemaking, at which time RPRC will:
 - ▶ Place the rule on the Inventory Rule Log;
 - ▶ Reschedule the item for a future RPRC meeting; or
 - ▶ Recommend to the Executive Director that the issue be considered at a Commissions' Work Session.
3. Approve the concept for rulemaking, at which time RPRC will:
 - ▶ Establish an intra-agency rulemaking team, and
 - ▶ Place the concept on the Rule Tracking Log.
4. Automatically initiate processing of rulemaking projects directed by the Commission, at which time RPRC will:
 - ▶ Place the project on the Rule Tracking Log
 - ▶ Establish an intra-agency rulemaking team, and
 - ▶ Ensure that time frames meet Commission requirements.

The Deputy Director of OPRD briefs the Executive Director for input and concurrence with RPRC's decision. Additional input from the Executive Director is noted and a final decision form is forwarded to the rulemaking team indicating the outcome of the Executive Director's briefing.

**REGULATORY
REFORM
STEERING
COMMITTEE**

The Regulatory Reform Steering Committee (RRSC) provides overall direction and sets clear objectives for staff to follow in a special effort to simplify, consolidate, and clarify rules, and eliminate unreasonably burdensome or outdated rules and processes. The committee concentrates on providing an expedited process for rule proposals to achieve the Commission's regulatory reform goals. RRSC also collects, reviews, prioritizes, and assigns proposals to cross-agency teams for evaluation. The Counselor to the Executive Director, the primary staff to the committee, collects proposals and is the liaison with agency staff and outside parties. The Executive Assistants to the Commissioners will act as liaisons for the Commissioners to legislative leadership offices.

The RRSC is composed of the following members:

- ▶ TNRCC Chairman
- ▶ TNRCC Executive Director
- ▶ TNRCC General Counsel
- ▶ Office of Policy and Regulatory Development Deputy Director
- ▶ Office of Legal Services Deputy Director
- ▶ Office of Compliance and Enforcement Deputy Director
- ▶ Counselor to the Executive Director

The RRSC's responsibilities are to:

- ▶ Develop general agency statements on rulemaking for adoption by Commission;
- ▶ Collect and develop regulatory reform proposals;
- ▶ Review and evaluate regulatory reform proposals based on input from agency management and staff;
- ▶ Prioritize regulatory reform proposals;
- ▶ Assign regulatory reform proposals to RPRC for assignment to teams for expedited processing and implementation;
- ▶ Provide direction to RPRC on scope, constraints, and expected outcomes of projects;
- ▶ Assign Sponsoring Deputies to teams;
- ▶ Provide direction to RPRC on membership of teams, time lines, and internal and external clientele; and
- ▶ Perform periodic assessment of progress of regulatory reform efforts.

**PROGRAM
OFFICES**

All program offices with significant operational responsibility for a rule should be represented on rulemaking teams. On most rulemaking projects, a representative from a program office will be the leader of the team. The office providing the team leader for a project will be responsible for drafting rule language. Program offices will be expected to have principal responsibility and authority for recommending the technical or operational content of the proposed rule, at least as the rule affects those offices. It is appropriate and expected, however, that other team members will question technical recommendations in order to evaluate such policy-oriented questions as economic reasonableness, statutory compliance, incorporation of appropriate flexibility, comparability with federal requirements, and other considerations relating to the agency's guiding principles and the goals of successful rulemaking.

Deputy and Division Directors with staff leading rulemaking projects bear particular and direct responsibility for the overall success of the project. The degree of success achieved on rulemaking projects in which an office or division had lead responsibility will be a significant factor in assessing the overall performance of the division and office. Deputy and Division Directors must maintain close awareness of the progress of such projects and provide guidance as necessary. Deputy and Division Directors with project lead responsibility under their purview are also responsible for coordinating with other programs and ensuring that any significant policy or operational implications or issues arising in the course of a project are brought to the attention of executive management and, in some instances, the Commissioners' Office in a timely manner.

As a point of clarification with respect to the following delineation of OPRD's oversight responsibilities, it should be noted that OPRD's oversight for certain aspects of rulemaking in no way absolves project leaders and their Deputy and Division Directors of the basic responsibility to conduct projects and deliver products which conform to the agency's guiding principles and the goals of successful rulemaking. (Roughly analogous to this is the concept that the oversight responsibilities of TNRCC's Budget and Planning and Financial Services Divisions do not absolve other offices of the responsibility to soundly manage their financial affairs.) No one with responsibility for a rulemaking project should assume that it is primarily the job of others in the chain of command or other offices to identify mistakes, issues, or implications and to appropriately elevate and communicate such matters.

**POLICY AND
REGULATORY
DEVELOPMENT**

OPRD is charged with functioning in an oversight capacity and in a coordination capacity with respect to rulemaking projects and processes.

Specific responsibilities include assuring that:

- Proposed and adopted rules are consistent with Commission policies and guiding principles;
- Rulemaking processes and the products produced achieve the goals of successful rulemaking to the maximum extent possible;
- Ongoing or planned rulemaking projects do not conflict with each other in terms of process or substance;
- Rulemaking efforts conform with established processes and procedures to the maximum extent possible;
- Issues in disagreement are elevated to upper management in a timely manner and a record of such issues and the positions originally taken is made available to the Commissioners;
- Appropriate and consistent format, style, and tone are used in rulemaking packages throughout the agency; and
- The rule log is maintained and kept current.

OPRD will typically have two members on rulemaking project teams. One representative will serve as the OPRD coordinator. This person will be responsible for ensuring team understanding of rulemaking process requirements and for substantively participating in the project to ensure that OPRD's oversight responsibility is fulfilled and the goals of TNRCC rulemaking are met. The other representative will come from OPRD's Texas Register Team and will have a narrower focus aimed at coordinating with the Texas Register and assuring that all Texas Register requirements are met.

**OFFICE OF
LEGAL SERVICES**

Office of Legal Services shall be represented on all rulemaking teams. While it may be appropriate for the Legal Services representative to have a broader role on many projects or to be the leader on some projects, the Legal Services representative will be viewed as the primary authority on legal questions that may arise in the context of rulemaking.

**SELECTING
RULEMAKING
TEAM LEADERS**

Effective team leadership is crucial to the success of rulemaking projects. The role of team leader is essentially a project management role. Ideally, the team leader should have successful project management experience (preferably on rulemaking projects), as well as substantial knowledge of the subject area the project addresses. Recognizing that the team leadership role and the primary drafting responsibility often go together and that this can be advantageous, the team leader ideally should also be someone with demonstrated skill in drafting rule language and preparing written responses to comments on rules.

Generally, it is expected and desired that team leadership will be assigned to the program office with primary responsibility for implementing the rule. There will be exceptions, however. One exception would involve situations where another office, such as OPRD or Legal, has greater technical expertise, as well as rule development experience, in the subject area. Another exception would be where a new rule or rule change affects a program area in which rulemaking activity occurs so seldom that it is inefficient to attempt to develop capability for leadership in rulemaking in that area. Another reason for an exception would be if the rule were of such a cross-cutting or multi-media nature that there would be no reasonable basis to assign lead responsibility to a particular program office. In these instances, the location of team leadership responsibility will need to be determined based on an assessment of where the resources exist and are available to lead the project.

**TEAM LEADER
RESPONSIBILITIES**

The team leader coordinates certain activities for the team such as organizing and scheduling meetings, making assignments, and ensuring that milestones are met. Perhaps more importantly, though, the team leader (and the team leader's management) bears primary responsibility along with OPRD for

conducting a process and delivering a product that meets the goals of successful rulemaking. To be successful, the team leader working in conjunction with team members must:

- Determine the full scope and complexity of the project as early as possible;
- Identify the critical timing issues as early as possible and draft a comprehensive time line;
- Identify the team's resource needs as early as possible;
- Identify all internal and external entities with an interest in the project as early as possible;
- Obtain resolution of internal issues as early as possible so that the agency approaches the formal rulemaking process with unity;
- Develop strategies for communicating with interested parties and stakeholders and obtaining their views early in the process;
- Flag issues that need to be elevated for the input or awareness of management or the Commissioners;
- Make assignments, including drafting assignments, to appropriate team members;
- Carefully evaluate options for addressing issues;
- Quality assure each draft of the preamble and rule;
- Ensure that responses to testimony are thorough and appropriate in tone; and
- Resolve issues raised by the General Counsel, if any.

**TEAM MEMBER
RESPONSIBILITIES**

The rulemaking team members' responsibilities are to:

- Attend the team meetings;
- Actively participate in team discussions and decision making;

- Communicate the team's activities to their appropriate Deputy and all affected divisions;
- Ensure comments and concerns of their respective areas are communicated to the team;
- Complete all assignments within the required time frame; and
- Review all drafts and final documents prior to proposal or adoption.